IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 3458 of 2002

For Approval and Signature:

Hon'ble MR.JUSTICE H.K.RATHOD

==========

1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : YES

3. Whether Their Lordships wish to see the fair copy of the judgement? : YES

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

BATLIBOI & CO.

Versus

MOHMADHANIF ISMAIL MANSURI

Appearance:

1. Special Civil Application No. 3458 of 2002

Mr. KD Gandhi for NANAVATI ASSOCIATES for Petitioner No. 1

MR PH PATHAK for Respondent No. 1

CORAM : MR.JUSTICE H.K.RATHOD

Date of decision: 07/05/2003

ORAL JUDGEMENT

Heard learned advocate Mr.Gandhi for the petitioner and Mr. Pathak for the respondent workman.

In this petition,the petitioner has challenged the award made by the labour court, Surat in Reference No. 171 of 1998 dated 30th July, 2001 wherein the labour court has granted reinstatement with continuity of service, with 60 per cent of the back wages for the intervening period.

Learned advocate Mr. Gandhi appearing for the petitioner has submitted that the petitioner was the habitual offender remaining absent in each year from1991 to 1996 almost in each year, his absence was more than 25 days and in some years, it was about 100 days and more than 50 and 131 days and, therefore, according to him, considering his past conduct he was served with the charge sheet dated 15.2.1998 wherein he remained absent in all for 124 days between January, 1997 to December, 1997 and therefore, he was asked to submit explanation by the petitioner and, thereafter, departmental inquiry was initiated against him wherein he admitted the charge and requested for pardoning him was made and ultimately he was dismissed by the petitioner on 20th April, 1998. Before dismissing him from service, he was served with a second show cause notice. Said order of dismissal was challenged by the respondent before the labour court Surat wherein the labour court granted reinstatement with other reliefs as stated earlier. It was submitted by him that the labour court has committed error in granting reinstatement to the respondent workman. He also submitted that before the labour court, written statement to the statement of claim was filed by the petitioner at Exh.11 and the necessary documents in support of the written statement were also produced by the petitioner vide Exh. 12 and the workman has also produced the document at Exh. 13. He also submitted that in view of the evidence produced by the petitioner before the labour court, the labour court ought not to have granted any relief in favour of the petitioner. He also submitted that in view of the evidence on record before the labour court, the labour court has committed error in recording the finding that the order of punishment is harsh and unjustified. According to him, labour court ought not to have granted any relief in favour of such habitual offender. According to him, grant of back wages to the extent of 60 per cent for the intervening period was a premium given by the labour court to the habitual offender and, therefore, the award of reinstatement is required to be quashed and set aside. He has submitted that the award of reinstatement with 60 per cent of the back wages for the intervening period is not proper and therefore, that part of the award is required to be set aside. Except these submissions, no other submissions were made by the learned advocate for the petitioner.

As against that, it was submitted by the learned advocate Mr. Pathak on behalf of the respondent workman that for his remaining absent for the period as stated earlier, the workman has requested for pardoning him as he has admitted the misconduct and it was his prayer before the petitioner to condone the lapses committed by him. He also submitted that the workman had undertaken before the authority at the relevant time that he will not repeat the same type of misconduct in future and, therefore, in such circumstances, considering the explanation and the prayer made by the workman, the petitioner was not justified in dismissing the respondent workman from service. According to him, there was arbitrariness on the part of the petitioner in dismissing the petitioner from service and no reasons were given for not considering his explanation and not giving him chance for improvement. According to him, to remain absent without prior permission of the employer has been considered to be the serious misconduct but various High Courts and the Hon'ble Supreme Court have time and again considered this aspect and has always held that the punishment of dismissal for such misconduct is harsh and unjustified and, therefore, considering the misconduct committed by the workman and also considering the explanation and the request for condoning the lapses on his part, the labour court was right in granting the reinstatement by exercising the discretion vested in it and, therefore, it was his submission that the award of reinstatement made by the labour court does not call for any interference of this court. As regards back wages for the intervening period, it was submitted by him that he is leaving this aspect at the discretion of this court and the court may pass appropriate order modifying the award in respect of the back wages only with a view to put an end to this litigation.

I have considered the submissions made by the learned advocates for the parties. I have also perused the award in question made by the labour court concerned. I have also perused the relevant record produced by the petitioner. Charge sheet dated 15th February, 1998 served upon the respondent workman by the petitioner is produced by the petitioner at page 18, Annexure A. From the said charge sheet, it does appear that the respondent was remaining absent from January, 1997 till December, 1997 for a period of about 124 days or so. From the explanation submitted by the workman, it appears that he remained absent as he was suffering from high blood pressure and therefore, he was not able to resume. In support of his sickness, the workman has also produced

ESI Certificate before the employer and has also undertaken that now, in the event of such sickness or for any other reason, he will inform and obtain prior leave of the employer for such cause and has also undertaken that he will not remain absent without prior permission of his employer and after making such explanation and undertaking as aforesaid, he prayed for condoning the lapses committed by him by showing some mercy to him in view of his situation. This was the sum and substance of the explanation submitted by the workman before the employer. Thereafter, departmental inquiry was initiated against the respondent on 27th February, 1998 wherein also, one question was asked by the inquiry officer to the workman as to whether the workman has received the charge sheet or not and the answer given by the workman was in the affirmative but while giving such answer, he tendered unconditional apology to the employer and he also accepted the charge sheet with an undertaking that now he will not remain absent without prior permission of the employer. It was also undertaken by the workman during the course of inquiry proceedings that now if given chance, he will not give any opportunity to the management for complain and since he was admitting the charge, therefore, no evidence was produced by him against the charge save and except the explanation accompanied by the medical certificate from ESI Hospital in the departmental inquiry dated 27th February, 1998. Thereafter, he was served with a second show cause notice dated 18th March, 1998 that since the charges levelled against him have been proved, why he should not be dismissed from service. However, unfortunately, reply to the said second show cause notice has not been given by the workman but the fact remains that having accepted the charge and having prayed for condoning the lapses by taking some lenient view, even if he would have given reply, would not have been able to pray anything save and except for condonation of lapses. The petitioner, thereafter, dismissed him from service on 20.4.1998 which was challenged by him before the labour court after raising of an industrial dispute.

Before the labour court, statement of claim was filed by the workman and the reply thereto was filed by the petitioner and the labour court after producing the evidence on record and the statement of claim as well as reply thereto given by the petitioner, it was considered by the Labour Court that the respondent was remaining absent without prior permission and has not informed his employer about his sickness and also above the leave. Therefore, on the basis of the record and the facts which were almost undisputed, the labour court has come to the

conclusion that the medical certificate was produced by the workman before the employer and it was undertaken by the workman before the employer that he will not now remain absent; he also tendered unconditional apology before the employer. All these facts are admitted facts apparent from the record and ultimately, the labour court has come to the conclusion that looking to the sickness of the workman and also his absence without prior permission of the employer in view of his sickness, the order of punishment of dismissal from service is little harsh and unjustified. The labour court was of the view that the employer has not been able to justify the order of dismissal and in view of that, the labour court has, in exercise of the powers under section 11A of the Industrial Disputes Act, 1947, set aside the order of termination and has also granted reinstatement with continuity of service with 60 per cent of the back wages for the intervening period. So far as the directions for reinstatement of the workman with continuity of service are concerned, as stated earlier, I am of the opinion that since the employer has not been able to satisfy as to why the unconditional apology tendered by the workman accompanied by his undertaking that now in future he will not proceed on leave without prior information to the employer and without prior permission of the employer not considered by the petitioner and for that, no reasons have been given by the petitioner but the labour court was justified in exercising the powers under section 11A of the I.D. Act, 1947. Therefore, according to my opinion, after considering the observations made by the labour court as well as the record produced by the petitioner before the labour court, the labour court was right in forming the opinion that in such a circumstances, the order of dismissal is little harsh as the conduct of the workman was normal and his approach was not adamant and, therefore, I am of the opinion that in such circumstances, it was the duty of the employer to show some leniency to the workman and the employer ought not to have passed such a harsh and unjustified order of dismissal against the workman. I am, therefore, of the opinion that the labour court was right in exercising the powers under section 11A of the I.D. Act, 1947 in granting reinstatement of service with continuity of service. Learned advocate Mr. Gandhi appearing for the petitioner has not been able to point out any infirmity. He has also not been able to point out that the labour court was not justified in granting reinstatement with continuity of service and, therefore and also in view of the evidence on record, I am of the opinion that the labour court has not committed any irregularity and, therefore, that part of the award does not call for any

interference in exercise of the powers under Article 226/227 of the Constitution of India.

However, so far as the second part of the impugned award namely grant of 60 per cent of the back wages for the intervening period is concerned, submissions were made by Mr. Gandhi for the employer that in view of the admission made by the workman of his having remained absent without prior intimation and permission of the employer and also in view of the unconditional apology tendered by the workman before the employer, the labour court ought to have refrained itself from granting any back wages for the intervening period and therefore, that part of the award is required to be quashed and set aside. It was also his submissions that even the labour court was also of the view that the order of dismissal was little harsh and in view of that also, on that ground, whole back wages for the intervening period ought to have been denied by the labour court. According to him, in such a case, denial of 40 per cent of the back wages for the intervening period was not sufficient and, therefore, that part of the award is required to be modified by this Court by directing reinstatement of the workman without any back wages for the intervening period.

As against that, it was the submission made by the learned advocate Mr. Pathak on behalf of the workman that since the employer has not been able to justify the order of dismissal before the labour court, the labour court was right in granting only 60 per cent of the back wages for the intervening period and, therefore, that part of the award also does not call for any interference of this court in exercise of the powers under Article 226/227 of the Constitution of India. It was his alternative submission that if this court is of the view that the award of 60 per cent of the back wages for the intervening period is not proper, then, some back wages may be granted to the workman for enabling the workman to discharge the obligations created by the workman during the period of his unemployment for his survival from his friend circle and well wishers.

Considering the submissions made by the learned advocates for the parties and looking to the facts and circumstances of the case, from the bare perusal of the charge sheet served by the petitioner upon the respondent workman, it does appear that the respondent was remaining absent from January, 1997 till December, 1997 for a period of about 124 days or so. From the explanation submitted by the workman. However, from the explanation submitted by the workman to the said charge sheet, it

appears that as he was suffering from high blood pressure, he was not able to resume. In support of his sickness. The workman has also produced ESI Certificate before the employer and has also undertaken that now, in the event of such sickness or for any other reason, he will inform and obtain prior leave of the employer for such cause and has also undertaken that he will not remain absent without prior permission of his employer and after making such explanation and undertaking as aforesaid, he prayed for condoning the lapses committed by him by showing some mercy to him in view of his situation. In view of that, it can be said that there was some lapse on the part of the workman and it can also be said that he has been able to justify the same since it is not the case of the petitioner employer that such certificate of sickness was false. In view of such admitted lapses on the part of the workman, the petitioner was required to justify the action of dismissal from service. As stated earlier, since the petitioner has not been able to justify as to why the dismissal was the only punishment against such a workman, I am of the opinion that the labour court was right in holding that the order of dismissal is harsh and unjustified. However, in view of the admitted lapses on the part of the workman, the award of 60 per cent of the back wages for the intervening period is on its higher side. From 1991 to 1997 as per the record, for a period of about six years, the workman remained absent for more than 25 days to 131 days but in past no action was taken and all such lapses were condoned by the employer. In the second show cause notice, the petitioner has alleged that the workman has committed the misconduct. If the workman is remaining absent and no action has been initiated by the employer for such lapse in past and same has impliedly condoned, then, there must be some justification and that is why no action has been taken by the employer and, therefore, according to my opinion, the petitioner cannot make the past record as a basis for passing the order of dismissal as no action has been taken by the petitioner against the workman for the lapses committed by the workman in past. Considering the alleged misconduct of remaining absent without prior intimation of the workman from January, 1997 to December, 1997, he was dismissed from service on 20.4.1998 and against that, industrial dispute was raised by the workman which was referred to the labour court and thereafter, impugned award was made by the labour court on 30th July, 2001. In view of that, according to my opinion that the award of reinstatement with 60 per cent of the back wages is on its higher side and the same is required to be modified. I am of the opinion that the

denial of only 40 per cent of the back wages is not sufficient punishment in such a case. Considering the oral submissions and the suggestions made by the learned advocates for the parties, I am of the opinion that it would be just and proper if that part of the award of back wages is modified by directing the petitioner to reinstate the workman with only 25 per cent of the back wages for the intervening period from the date of dismissal till the date of the impugned award. Therefore, to that extent, this petition is required to be allowed.

In the result, this petition is partly allowed. The award made by the labour court, Surat in Reference No. 171 of 1998 dated 30th July, 2001 wherein the labour court has granted reinstatement with continuity of service, with 60 per cent of the back wages for the intervening period is hereby modified in so far as it relates to the back wages for the intervening period and accordingly the petitioner is directed to reinstate the respondent workman in service with 25 per cent of the back wages for the intervening period with continuity of service. Rule is made absolute in terms indicated hereinabove with no order as to costs.

It was submitted by the learned advocate Mr. Pathak on behalf of the respondent workman that some suitable directions may be issued to the petitioner to reinstate the respondent workman in service with back wages as modified by this court within some reasonable period. As against that, it was the submission of the learned advocate Mr. Gandhi for the petitioner that some reasonable period may be given to the petitioner for implementing the award as modified by this court. Accordingly, it is directed to the petitioner to reinstate the respondent workman within one month from the date of receipt of copy of this order and topay 25 per cent of the back wages for the intervening period from the date of dismissal till the date of the award within three months from the date of receipt of copy of this order. It is clarified that the workman is entitled for the regular wages for the period from the date of the award till the date of his actual reinstatement and it is directed to the petitioner to pay the same regular wages to the respondent workman from the date of the award till the date of his actual reinstatement within the period of four months from the date of receipt of copy of the present order.

Dt.7.5.2003. (H.K. Rathod,J.)
Vyas